UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General, Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILLIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

AFFIDAVIT OF EDWARD J. SCHWARTZBAUER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DATED MARCH 2, 1984

STATE OF MINNESOTA )
)
COUNTY OF HENNEPIN )

EDWARD J. SCHWARTZBAUER, being first duly sworn, deposes and states as follows.

1. I am one of the attorneys for Reilly Tar & Chemical Corporation ("Reilly"), one of the defendants in this action. I am thoroughly familiar with the matters set forth in this affidavit by virtue of having personally reviewed documentary evidence and by having been the attorney principally in charge of the preparation of this case for trial. I make this affidavit in opposition to the motions of the United States and the State of Minnesota for summary judgment with respect to Reilly's defense that the Comprehensive Environmental Response and Comprehensive Liability Act of 1980 ("CERCLA") is unconstitutional as applied to the peculiar facts of this case. Reilly does not contend that CERCLA is unconstitutional in all of its potential applications.

2. It is difficult to present in a response to a motion such as this sworn affidavits supporting each and every point which is expected to be shown by the evidence at the trial on the merits. This is so because the constitutional challenge in this case relates not only to the plaintiffs' efforts to apply CERCLA to activities which occurred over a 55-year period preceding 1972, but also because that challenge

is based upon the manner in which the plaintiffs are attempting to apply the Act. Stated differently, Reilly's challenge is in part based upon the knowledge that the plaintiffs intend to apply to Reilly's activities of many years ago, regulatory and other standards that did not exist at that time, and are seeking a remedy based upon those newly-adopted standards and criteria. Moreover, since the plaintiffs have not, until the last few months, had any remedial plan for the former Reilly site and, at the date this affidavit is prepared, have not yet, through discovery, formally set forth their remedial plan or claimed damages, this affidavit must necessarily be based upon conversations and correspondence with the plaintiffs' attorneys concerning their positions, as well as that discovery which has been finished. In addition, Reilly has not yet finished its trial preparation. Therefore, although I have corresponded with and interviewed expert witnesses who will testify in this case, they are still researching and considering their opinions. Under those circumstances it would be unfair to the witnesses and to Reilly, and might lead to later misunderstandings, if sworn affidavits by expert witnesses were filed at this time.

2. It is not by Reilly's choice that important legal issues of constitutionality are tendered to the Court at this time and in this manner. It is my belief, based upon more than 25 years of trial experience, that the Court cannot possibly

resolve Reilly's constitutional challenge to the applicability of current laws, regulations and criteria, without hearing the evidence as to how those laws, regulations and criteria are being applied by the plaintiffs. However, the United States and the State have insisted on filing their motions at this time, apparently with the belief that since the State has previously succeeded in isolating one of Reilly's defenses (that many of the issues as between the State and Reilly were settled in 1972) and persuading this Court to enter partial summary judgment, they can obtain ultimate victory by attacking each Reilly defense piecemeal, even though, as this affidavit later will show, most of the issues are interdependent.

4. In order to bring before the Court at this time some of the scientific opinion which will be offered at the trial. I attach to this affidavit as Exhibits A, B and C, three reports. Exhibit A is a copy of a report by Dr. William A. Poel, University of Pittsburgh, with whom I have corresponded and to whom I have spoken concerning this case, and who will be a witness in this case. The report was originally prepared in connection with the deliberations of the Environmental Protection Agency ("EPA") concerning whether to accept the registration of creosote as a pesticide under the Federal Insecticide, Fungicide and Rodenticide Act, and was submitted to and accepted by the EPA at that time. Exhibit B is a copy of the Foreword, the Technical Summary and Chapter 4

of a very lengthy report prepared for Reilly by Environmental Research 6 Technology, Inc. ("ERT"). The Foreword presents an overall perspective on the St. Louis Park problem and summarizes the recommended solutions in non-technical terms. The Technical Summary sets forth the essential parts of the main report. Chapter 4 is that portion of the report which deals with the establishment of a prospective criteria for PAH in drinking water. Exhibit C was also included in the ERT report as Exhibit I. However, it was not prepared by ERT. It was prepared by Dr. Julian Andelman, of the Graduate School of Public Health, University of Pittsburgh, and by Dr. Joseph Santodonato, Syracuse Research Corporation.

5. The reports attached do not represent a single view or assessment of the carcinogenicity of polynuclear aromatic hydrocarbons (PAH). Rather, they represent a range of scientific views. The Andelman-Santodonato report is the more conservative, or cautious view. Dr. Santodonato is a toxicologist who is a nationally recognized expert on the health effects of PAH. He is also the author of the United States EPA Ambient Water Quality Criteria documents for PAH and for fluroanthene. He has directed many risk assessment projects under contract to the EPA, and has served as an expert reviewer for nine of their Ambient Water Quality Criteria Documents. Dr. Poel is very recently retired, having enjoyed a national reputation as a toxicologist and professor of

toxicology at the University of Pittsburgh for many decades. He was retained by the American Wood Preservers Association to help in the preparation of its successful position paper in connection with the registration of creosote as a pesticide. The Andelman-Santodonato paper was presented by Reilly to the plaintiffs in this matter in May, 1983 to illustrate a conservative yet responsible approach to the establishment of safe and workable criteria for the State of Minnesota and the City of St. Louis Park, to be applied prospectively. Dr. Poel will be asked at trial to give a historical as well as a current perspective to the assessment of any health risks associated with coal tar and creosote.

6. From the reports which are attached, several broad conclusions can be reached, as follows.

(1) PAH is a class of substance which is widespread in the environment. They are created by both slow and rapid combustion and pyrolysis. They occur throughout the environment because of both human and natural activities. They are found in coal, coal tar, creosote oil, and petroleum because coal and oil are formed over millions of years as decayed animal and vegetable matter undergoes compaction and thermal processes. Accordingly, PAH are also found in peat and other organic soils, as well as in many types of vegetation. PAH are found in treated and untreated public drinking water supplies of many communities in the United States and throughout the world.

(2) Coal by-products were first hypothesized as a possible cause of cancer by Percival Pott, an English scientist, in 1775, who perceived an elevated level of scrotal cancer among chimney sweeps.

(3) Polycyclic aromatic hydrocarbons (PAH) were among the first compounds shown to be associated with the development of cancers in animals.

(4) There is an important difference between animal carcinogenicity and human carcinogenicity. There are wide ranges of contrasting findings even between different strains of mice and different animals. Many respected scientists believe that it is erroneous to extrapolate from mouse to man.

(5) Chemicals which are experimentally carcinogenic when considered in isolation are often not carcinogenic when the exposure is to a mixture of chemicals, or to the product (such as creosote) itself. At times, the mixture or the product is anti-carcinogenic.

(6) There is substantial evidence, both experimental and epidemiologic, that current levels of exposure to coal tar and its products may be enhancing natural defenses for cancer prevention.

(7) Only a few PAH are considered carcinogenic; many more are not. Methods exist for determining the carcinogenicity of PAH which have not been tested, based on their molecular structure.

(8) Coal tar is used medicinally without ill effects.

(9) There are differences between respected scientists as to whether there are occupational hazards in the coal by-products industries associated with certain forms of cancer. However, there are no reports of scrotal cancer hazards in current decades, although such cancer associations have been earnestly sought in the coal by-products industry. In addition, skin cancer has not been an occupational hazard in the coal tar, creosote or coal by-products industry for the past quarter of a century, in spite of the increased use of coal by-products. These industries are also characterized by the absence of an occupational lung cancer hazard in the past quarter century. Dr. Poel concludes (1) that there is no epidemiologic evidence defining coal tar as an etiologic agent of scrotal or other skin cancers in man, (2) the incidence of skin, scrotal, lung and respiratory tract cancers in coal by-product workers tend to be lower than those for control segments of the population.

(10) The concentrations of PAH in the St. Louis Park water do not exceed the conservative criteria for "carcinogenic" PAH recommended by the EPA, and do not exceed the conservative criteria for "noncarcinogenic" PAH recommended by Drs. Andelman and Santodonato; hence, the St. Louis Park wells could be reopened and used at any time without adverse health risks.

(11) The unpublished Minnesota criteria for "noncarcinogenic" PAH of 280 ppt was derived simply by multiplying 28 by 10, and is, therefore, purely arbitrary. It is totally lacking in any scientific support.

(12) The wells in St. Louis Park were closed at the instigation of the Minnesota Department of Health because of the failure to make a distinction between carcinogenic and non-carcinogenic PAH, because of its unscientific effort to avoid the possible synergistic effects of "carcinogenic" and "non-carcinogenic" PAH and because of the lack of any legally established standards for PAH.

(13) A careful review of the actual PAH concentrations in St. Louis Park water reveals that "noncarcinogeoic" PAH are the primary problem in closed wells, not "carcinogenic" PAH.

(14) As indicated in the ERT report, adoption of even a very conservative criteria for PAH would not require substantial remedial measures in St. Louis Park. After closing multi-aquifer wells that might otherwise permit further downward migration of PAH, it is recommended that a comprehensive monitoring program be created. In addition, the report recommends contingency measures that would only be taken in the event of migration which is not predicted on the basis of computerized groundwater modelling.

(15) The criterion recommended by the EPA for "carcinogenic" PAH and the criteria recommended by Drs. Andelman and Santodonato for "noncarcinogenic" PAH is already met by finished water from all of the municipal supply wells in St. Louis Park and Hopkins that are currently closed, based on recent analyses by a number of different laboratories. The total concentration of carcinogenic PAH in finished water that would result from reopening those wells is comparable to concentrations in finished drinking water supplied in most communities in the United States.

7. The issues which necessarily arise in this case are closely interwined. As the Court will recall from prior motions in this matter, the City has asked for a declaratory judgment that the settlement agreement, purchase agreement, and "hold harmless" agreement entered into between it and Reilly in 1972 and 1973 is inapplicable to its current claims against Reilly for a variety of reasons, including a claim that there has been a change of circumstances - i.e., that there was a "discovery" by the Minnesota Pollution Control Agency in 1974 that the soil and groundwater contained coal tar constituents which are harmful to health in that some of these constituents are carcinogenic.

8. Reilly contends, with respect to the City's declaratory judgment claim, that nothing has substantially changed; that prior to 1973 some members of the scientific

community believed that there was a causal connection between exposure to coal tar constituents and cancer while others claimed that there was not; and that the same division of opinion exists today.

9. A major portion (perhaps the major portion) of the trial will consist of evidence concerning the appropriate extent of the remedy: The National Contingency Plan, 47 Red. Reg. 10972 et. seq. (March 12, 1972), 40 CFR Part 300 (1983) (hereinafter NCP § ___) adopted by the Environmental Protection Agency ("EPA") under the authority of CERCLA § 105, governs the appropriate extent of response authorized by CERCLA. NCP § 300.61(a). Under § 300.68(j) of the NCP, the remedy is to be that which is most "cost-effective" [i.e., the lowest cost alternative that is technologically feasible and reliable and which effectively mitigates and minimizes damage to and provides adequate protection of public health, welfare, or the environment.] Thus, in determining whether the plaintiffs' proposed remedies are reasonable, the issue will necessarily be whether the amount of coal tar constituents left in the soil constitute a significant health hazard, and if they do, what measures are necessary to reduce the hazard. In short, the issue in the CERCLA case is "how clean is clean?"

10. The litigation of the health questions raised in the CERCLA case are the same health questions which will be relevant on the question whether the City will be allowed to

set aside the hold harmless agreement reached in 1973. Moreover, with respect to Reilly's constitutional challenges to the retroactive application of the statute, the United States is expected to contend at trial, as it has in other RCRA and CERCLA cases, that there is no unfair retroactivity if the defendant would have been liable under common law principles of negligence or nuisance. Accordingly, the case will necessarily require a review of facts and communications between the parties which occurred throughout the greater part of this century. Discovery concerning those ancient activities has been proceeding in this case. However, discovery is not complete, as explained more fully in Reilly's motion dated February 14, 1984 for extension of the May 1, 1984 discovery deadline, on file herein.

11. Reilly's defense relating to the collateral estoppel effect of the findings in the NPDES hearings in 1975 (covered by a separate motion, separately briefed, scheduled for hearing on April 13, 1984) is also intimately related to Reilly's defense against the City's declaratory judgment claim, since the outcome of the NPDES hearings was a quasi-judicial determination that the claims of groundwater pollution were settled in the prior litigation.

12. Similarly, Reilly's defense of laches against the plaintiffs is also closley related. The long passage of time has made it virtually impossible to construct a defense.

Potential witnesses often cannot remember the facts relating to important issues, even if their recollection is refreshed from documents. Some of the possible Reilly witnesses are very old, that is, in their eighties or nineties. In 1980, after Dorsey & Whitney was first retained to represent Reilly, my partner, William E. Keppel and I interviewed many of these aged persons near their homes in Indianapolis, Indiana or elsewhere. The interviewees included P.C. Reilly, T.E. Reilly, Sr., T.E. Courtney, Malcolm Mitchell, Thomas E. Ryan, H.A. Horner and F.J. Mootz. With the exception of Ryan, each either had a poor recollection of important events or was not involved in them. By this time, it was already too late for them to be of significant assistance in preparing a defense. I made a deliberate decision not to take these witnesses' depositions, with the exception of Ryan, because their memory of significant events was already too poor to be of any assistance. Moreover, subsequently, the depositions of some of these aged witnesses were taken by the State. In my opinion, because of the age of the witnesses and the fact that they were being questioned concerning forty-year old incidents, some of the testimony was inaccurate.

13. When this case is tried, even the younger witnesses will not remember important incidents which occurred in the early 1970's. In my opinion, based on my experience, there is no way that this Court can fully assess the impact of

the delay without hearing the witnesses, seeing them struggle to remember important but ancient events, and hearing them say "I can't remember."

14. In any event, this laches defense is also closely related factually to Reilly's other defenses. To make a decision on the validity of any one of them in the context of a motion for partial summary judgment before trial causes wasteful problems with respect to discovery and potentially wasteful problems should this Court's decision ultimately be reversed. As an illustration, one result of this Court's order granting summary judgment on Reilly's settlement defense has been that the plaintiffs have advised that they will now instruct their witnesses not to answer questions on discovery relating to that defense. This will make it necessary for Reilly to make a motion before the magistrate to compel further answers, and in briefing and determining such a motion it will be necessary to make a decision whether the answer to the question relates to only one, or more than one, issue. Thus, trying to decide the case in pieces causes delay and expense to the parties and to the Court.

15. The harm to the party against whom partial summary judgment is granted is great and may be irreparable, if the partial summary judgment, which is nonappealable, is later reversed after a trial on the merits. In such a situation, if issues are intertwined, it will not be possible to order a new

trial only on the issue on which partial summary judgment was granted. Rather, much of the evidence concerning a fifty-five year plant operation and a six-year delay in reinstating a lawsuit will again be offerred. If discovery has been blocked because of a premature court ruling, discovery will have to begin again, years later. But memories will be even worse, and more witnesses may have died or become incapacitated.

16. Exhibit D, attached hereto, are true and correct copies of pages 1 and 196-202 of the Deposition of Carleton B. Edwards.

17. Exhibit E, attached hereto, are true and correct copies of pages 1, 79-91 and 137-148 of the Deposition of Herbert L. Finch.

18. Exhibit F, attached hereto, are true and correct copies of pages 1, 79-80, 85, 452-457 and 472-473 of the Deposition of Harold R. Horner.

19. Exhibit G, attached hereto, is a true and correct copy of an Agreement in Respect to Demolition, Removal and Clean-up Work dated April 14, 1972 and signed by Frank Pucci, Chris Cherches and Tom Ryan. This document has been marked during deposition as Reilly Tar Exhibit 158.

20. Exhibit H, attached hereto, are true and correct copies of pages 1 and 220-222 of the Deposition of Frank J. Mootz.

21. Exhibit I, attached hereto, is a true and correct copy of a memorandum from Mr. Mitchell to Mr. Holstrom dated January 28, 1941. This document has been marked during deposition as Reilly Tar Exhibit 60.

22. Exhibit J, attached hereto, are true and correct copies of pages 1, 175-176 and 212-216 of the Deposition of Richard J. Hennessy.

FURTHER AFFIANT SAITH NOT.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Edward J. Schwartzbauer

Subscribed and sworn before
me this 23rd day of March, 1984.

Notary Public

KAREN J. FORD
NOTARY PUBLIC - MINNESOTA
WRIGHT COUNTY
My Commission Expires Oct. 28, 1990